

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MAY 27, 2011

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THIS WEEK:

- **Voluntary Manslaughter; Jury Charges**
- **Mental Retardation; *Miranda* Rights**
- **Effective Assistance of Counsel, Sentencing**
- **Motion in Arrest of Judgment; Appellate Jurisdiction**
- **DUI; Implied Consent**
- **Merger**
- **Tape Recording Evidence, Jury Charges**
- **Severance, *Brady***
- **Hearsay, Judicial Misconduct**

Voluntary Manslaughter; Jury Charges

Davidson v. State, S11A0120 (5/16/11)

Appellant was convicted of felony murder and two counts of aggravated assault in connection with the shooting death of a three-year-old. He argued that the trial court erred by refusing to give the jury his requested charge on voluntary manslaughter. Appellant did not contend that the three-year-old homicide victim provoked him but rather that all of the “chaotic and angry events” in the neighborhood that day constituted serious provocation.

The Court held that appellant’s claim of error failed for want of evidence supporting his requested charge. Appellant testified at trial that he was not upset when he pulled his gun out, but he opened fire because he felt his life was in danger. Based on his testimony, the trial court had instructed the jury on the law of justification and defense of self or others. A charge on voluntary manslaughter is not available to a defendant whose own statement unequivocally

shows that he was not angered or impassioned when a killing occurred, and when the other evidence does not show otherwise. The Court reasoned that appellant’s testimony that he was not upset but fired out of fear and to defend his life showed that he did not shoot the victim in the heat of passion. Moreover, the testimony of the only other trial witnesses present during the shooting demonstrated that appellant may have opened fire in response to the victim’s parents’ heated statements, which the Court noted could not constitute “serious provocation” as a matter of law. Therefore, the Court held that the trial court did not err by refusing to charge the jury on voluntary manslaughter.

Mental Retardation; Miranda Rights

Barrett v. State, S11A0292 (5/16/11)

Appellant was indicted for malice murder and concealing the death of another in connection with the killing of his girlfriend and the mother of his children. The Court granted appellant an interlocutory appeal from an order of the superior court, which denied appellant’s motion to suppress certain statements he made to law enforcement officers in order to consider whether the superior court had erred in concluding that appellant’s waiver of his *Miranda* rights was knowing and voluntary in light of his mental disabilities.

Appellant argued that his statements should have been suppressed because his mental disabilities prevented him from voluntarily, knowingly, and intelligently waiving his *Miranda* rights. The Court emphasized that the mere fact that a defendant who has confessed to a crime may have some mental disability, below average intelligence, or even moderate mental retardation does not, in and of itself,

warrant the exclusion of the defendant's inculpatory statements. There must be additional and sufficient evidence that the defendant did not have the capacity to understand and knowingly waive his *Miranda* rights. Further, whether a defendant has the capacity to understand and waive such rights is a question of fact for the trial court to determine.

In this case, the trial court found that appellant was twice advised of his *Miranda* rights; that he twice indicated he understood those rights and voluntarily waived them; and that thereafter he gave his statement freely and voluntarily without any hope of benefit or fear of injury. The trial court expressly stated that it had reviewed the "Forensic Services Psychological Evaluation" and noted that the evaluating psychologist found that appellant was competent to stand trial; that his cognitive abilities fell within the "upper range of [m]ild [m]ental [r]etardation," and that appellant's score on an administered test indicated that he might be "malingering psychiatric illness." The trial court determined that the State had demonstrated that appellant had the capacity to understand and waive his *Miranda* rights at the time of his questioning. Because there was sufficient evidence in the record to support the superior court's determination, the Court affirmed the ruling of the superior court.

Effective Assistance of Counsel, Sentencing

Brown v. State, S11A0298 (5/16/11)

Appellant was convicted of two counts of malice murder and various related offenses in connection with the asphyxiation death of one victim, and the bludgeoning death of the other victim. Appellant argued that the trial court erred in denying his claim of ineffective assistance of trial counsel without holding an evidentiary hearing.

The Court noted that "where the 'ineffectiveness [of counsel]' relates to alleged errors made during the course of the trial as shown by the transcript, then trial counsel's testimony may not be required; the record speaks for itself." The Court emphasized that remand for an evidentiary hearing is not mandated "if we can determine from the record that the defendant cannot establish ineffective assistance of counsel under the two-prong test set forth in *Strickland v. Washington*."

Appellant alleged that trial counsel was

constitutionally ineffective because he failed to discredit the veracity of an inmate who testified for the State by presenting certified copies of the inmate's convictions, and because he failed to sufficiently cross-examine the chief investigating officer. The Court noted that at trial, the inmate witness appeared in his prison clothes and the State elicited testimony from him that he was a convicted felon. Because the evidence was already before the jury, trial counsel was not incompetent for failing to present certified copies of the inmate's convictions. The Court also found that appellant's trial counsel had conducted a thorough cross-examination of the investigating officer, and that there was no evidence that further cross-examination would have yielded statements that could have resulted in a different outcome at trial. Because a review of the record clearly showed that appellant's claim failed to meet the *Strickland* test, the Court upheld the trial court's ruling that an evidentiary hearing was not required.

Moreover, although not enumerated as error, the Court found that the trial court had imposed excessive sentences. The jury had found appellant guilty of all crimes charged in the indictment, including two counts of malice murder resulting from the killings of the victims, and three alternative counts of felony murder of the same two victims. The jury found the existence of four statutory aggravating circumstances as to each of the two malice murder charges, and it recommended life without possibility of parole as to each count. The trial court, however, imposed five consecutive sentences of life without parole—two for each of the malice murder counts and three for the alternative felony murder counts, without objection from the defense.

The Court held that the three additional life sentences for felony murder were illegal and could not stand. As to an individual victim, the defendant may be sentenced on either malice or felony murder but not both. Therefore, the Court remanded the case to the trial court with direction that the additional three sentences for felony murder be vacated.

Motion in Arrest of Judgment; Appellate Jurisdiction

Lay v. State, S11A0560 (5/16/11)

Appellant appealed from the trial court's denial of his motion in arrest of judgment in

which he asserted that his indictment was substantively defective because it did not set forth the essential elements of the "charged offense." The trial court summarily denied this motion.

The Court noted this case raised a question of appellate jurisdiction to which the Court has never squarely stated an answer. Under OCGA § 17-9-61 (a), a motion in arrest of judgment must be based on a non-amendable defect that appears on the face of the record or pleadings and "must be made during the term at which the judgment was obtained." The Court held that appellant raised a proper ground for a motion in arrest of judgment by claiming that his indictment failed to allege an essential element of the crime. Moreover, a trial court's ruling on a motion in arrest of judgment is normally directly appealable to whichever appellate court has subject matter jurisdiction over the case. However, appellant's motion was extremely untimely, as it was filed over six years after the term in which he was convicted. Therefore, the Court had to decide whether the *untimely* filing of a motion in arrest of judgment precludes a defendant from appealing the trial court's ruling on the motion.

Previously, the Court had addressed the merits of direct appeals from trial courts' rulings on untimely filed motions in arrest of judgment, without discussing this jurisdictional issue. However, in this case the Court expressly ruled that the untimely filing of a motion in arrest of judgment in the trial court is not a defect in *appellate* jurisdiction, as would an untimely filed notice of appeal. Instead, the Court held that the untimeliness of the motion was simply a defect that limited the *trial court's* authority to grant the motion. The Court emphasized that it had reached the same result concerning the motion to withdraw a guilty plea. Pursuant to its jurisdictional holding, the Court affirmed the trial court's denial of appellant's motion, as it was clearly untimely.

DUI; Implied Consent

State v. Davis, A11A0097 (5/12/11)

The State appealed from the grant of a motion to suppress evidence of a state-administered breath alcohol test. The facts showed that Davis was driving her friend's vehicle when she approached a police roadblock and an officer there noticed that she smelled of alcohol. He

administered an Alco-Sensor test and field sobriety test which both showed that Davis was intoxicated. The officer then arrested Davis and asked her to submit to a State-administered chemical breath test, which she first refused but then accepted. She told the officer that she wanted a blood test, and he responded that he would take her and that she should choose the hospital where she wanted the test administered. Davis then told the officer that she didn't have money with her, at which point the officer changed her request for a blood test to a second breath test. Davis was charged with driving while having an unlawful alcohol concentration and driving under the influence to the extent that it was less safe. The trial court granted Davis' motion to suppress the evidence of the State-administered breath test because it found that the officer did not reasonably accommodate Davis' request for an independent blood test, and therefore the results of the State-administered breath test were inadmissible.

The State contended that the trial court erred, arguing that (1) the officer made reasonable efforts to accommodate her request for an independent chemical test, and (2) Davis withdrew her request for the independent blood test, and therefore no reasonable accommodation was necessary. The Court held that when an officer fails to get an independent blood test after the request of the accused, "it is incumbent on the trial court to determine whether that failure was justified. In making that determination, the trial court must decide if, under the totality of the circumstances, the officer made a reasonable effort to accommodate the accused who seeks the independent test." The Court found that the trial court's decision had no error because the officer's unilateral determination that Davis would be unable to pay for the blood test, without confirming the hospitals' policies regarding payment and without offering to accommodate Davis in obtaining a method of payment, was insufficient. Therefore, the Court agreed that reasonable accommodation was not made and affirmed the judgment.

Merger

Hudson v. State, A11A0669 (5/13/11)

Appellant was convicted of both aggravated sexual battery and child molestation. The facts showed that appellant would take

the 10-year-old victim back to his bedroom, take off all her clothes and put his fingers in her sexual organ. Appellant argued that the crimes of aggravated sexual battery and child molestation should have been merged. The Court agreed. Under OCGA § 16-6-22.2 (b), "A person commits the offense of aggravated sexual battery when he or she intentionally penetrates with a foreign object the sexual organ or anus of another person without the consent of that person." OCGA § 16-6-4 (a) provides that: "A person commits the offense of child molestation when such person: (1) Does any immoral or indecent act to or in the presence of or with any child under the age of 16 years with the intent to arouse or satisfy the sexual desires of either the child or the person. . . ."; and the second count of the indictment is for appellant doing just that. Under the "required evidence" test set forth in *Blockburger v. United States*, 284 U. S. 299, 304 (1932), merger is only required when the same act or transaction constitutes a violation of two distinct statutory provisions, and each provision does not require any proof of a fact which the other does not. Here, the Court found that the two charges were indistinguishable because the date, victim, and description of defendant's conduct constituting the offense were identical and within the period of the statute of limitation. The Court therefore remanded the case for resentencing.

Tape Recording Evidence, Jury Charges

Castillo v. State, A11A0372 (5/11/11)

Appellant was convicted of child molestation and sexual battery. He contended that his convictions should be reversed because the trial court erred when it instructed the jury that the transcript of a conversation translated from a foreign language into English did not constitute substantive evidence. The record showed that a telephone conversation between the victim's mother and appellant (spoken in Spanish), in which he confessed to the molestation and sexual battery, was entered into evidence. A written transcript translating it into English was prepared before trial and the trial court arranged for an interpreter to be available at trial to orally translate the taped conversation for the jury. The trial court told the jurors that they would be given copies of the transcript, but instructed them that the

taped telephone conversation itself was the evidence, not the transcript, which was just there to assist them.

Appellant argued that the court should have instructed the jury that the transcript, because it was a translation from a foreign language, constituted substantive evidence. He contended that by failing to instruct the jury in this manner, the jury might have disregarded the transcript and instead have relied exclusively on the simultaneous oral translation to arrive at the content of the telephone conversation. The Court looked to the record, which showed that appellant made no objection to the jury instruction or the evidence during the trial, and therefore any error was waived. It also found that it was highly probable that the alleged error in the trial court's limiting instruction did not contribute to the judgment. Accordingly, the Court found no error in the trial court's instructions and affirmed the judgment.

Severance, Brady

Scruggs v. State, A11A0642 (5/13/11)

Appellant was convicted of armed robbery, aggravated assault and criminal trespass. He argued, among other things, that the trial court erred in refusing to sever his trial from that of his co-defendant and in violating *Brady v. Maryland* by withholding information from him. The Court disagreed with all of appellant's arguments and found no error in the ruling of the trial court.

Appellant contended that because his defense and the defense of his co-defendant were antagonistic, severance of their trials was required. The Court held that it is incumbent upon the defendant who seeks a severance to show clearly that the he or she will be prejudiced by a joint trial, and in the absence of such a showing, the trial court's denial of a severance motion will not be disturbed. The Court found that since appellant did not point to any testimony or other evidence introduced at the joint trial he received that could not have been introduced against him in a separate trial, he failed to meet his burden of showing harm. Accordingly, the Court held that the trial court made no error in denying appellant's motion to sever the trial.

Appellant also argued that the State violated *Brady v. Maryland* by withholding information from him about the conditions

under which the armed robbery victim was testifying. The Court said that in order to prevail on a *Brady* claim it must be shown that “had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.” Appellant failed to show the necessary proof that the trial’s outcome would have been any different if he had been given the information. Therefore, the Court held, the trial court made no error in denying appellant’s motion for new trial on that basis.

Hearsay, Judicial Misconduct

Steed v. State, A11A0318 (5/11/11)

Appellant was convicted of DUI-less safe, driving with a suspended license, and improper lane change. Appellant made several arguments, including that the testimony concerning his driving record was hearsay and that the judge in the trial court had committed judicial misconduct.

The record showed that appellant made statements to the arresting officer about his North Carolina license being suspended, and a tape recording of that conversation was entered into evidence at trial. Appellant argued that because the tape recording was inaudible, it should not be admissible as evidence. He also argued that the statements he made concerning his license were irrelevant hearsay. The Court held that admission of a recording of a conversation when part of it is inaudible is in the trial court’s discretion, and the trial court did not abuse its discretion in admitting the evidence and denying appellant’s motion. Concerning the actual statements made in the recording about appellant’s driver’s license, the Court found that the evidence met the standard established in *Wilbourne v. State*, 214 Ga. App. 371, (1994) on “whether the factfinder would be authorized to believe the declarations were made without premeditation or artifice, and without a view to the consequences” and was therefore admissible.

Appellant also contended that the trial court committed judicial misconduct by commenting on the evidence. The record showed that appellant was representing himself at trial. While appellant was giving his opening statement, the judge made a statement to him that he had no evidence to substantiate the claims he was making. Appellant argued that

the judge improperly commented on evidence in violation of OCGA § 17-8-57. The Court, however, found that there was no comment on what had or had not been proven or his guilt or innocence and therefore there was no violation.